The appeal against sentence was not seriously pursued. In any event, learned Counsel had not been able to show the Court how the learned Magistrate had erred in imposing a fine of RM3,000 when the maximum fine permitted by the Act is RM15,000 for a first offence. The appeal is therefore dismissed save that the conviction of the accused is under Regulation 3 read with s. 27 of the Act. I note that there is a stay of execution of the sentence granted by the learned Magistrate. The stay is lifted and the appellant has 7 days in which to pay the fine of RM3,000, failing which he shall serve a term of imprisonment of 3 months. The proceeds of the sale of the seized rice are to go to the Lembaga Padi dan Beras Negara.

YAN WING LEE

v.

PUBLIC PROSECUTOR

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 52-70-92 (IPOH 42(52)-54-89)]
17 MAY 1993

CRIMINAL LAW & PROCEDURE: Firearms (Increased Penalties) Act 1971 - Section 4 - Robbery, exhibition of revolver at time of commission of robbery and likelihood of putting person in fear of death or hurt.

APPEAL: Petition of Appeal - Whether appellant could raise/rely on grounds not itemised in petition of appeal - Section 307(vi) Criminal Procedure Code - Appellate Court - Whether appellate Court entitled to disregard grounds not itemised in petition of appeal.

EVIDENCE: Break in chain of evidence - Evidence of prosecution witnesses - Break in chain of evidence in regard to movements of revolver - Handling of revolver from the time it was seized by police detectice from appellant till it was handed over to investigation officer - To consider whole of evidence.

EVIDENCE: Dock Evidence - Unsworn evidence of appellant from dock - Defence story - Duty of Court to consider statement from dock.

EVIDENCE: First Information Report - Police report lodged after commencement of investigation - Whether report admissible.

EVIDENCE: Evidence of witnesses - Existence of discrepancies - Whether sufficient to destroy credibility - Question of weight - Effect of evidence which are too consistent - Whether trifling or material discrepancies.

This was an appeal against the decision of the Sessions Judge, Sessions Court, Taiping who convicted the appellant on a charge under s. 4 of the Firearms (Increased Penalties) Act 1971. The appellant was sentenced to imprisonment for life and ordered to receive six strokes of the rattan. Hence, this appeal.

Held:

[1] The prosecution have proved beyond reasonable doubt that there was robbery, exhibition of the revolver at the time of the commission of the robbery and the likelihood of putting PW3,

PW5, PW11, PW9 and PW10 in fear of death or hurt.

[2] The trial Court rightly came to the conclusion that the appellant was a willing and active participant in the armed robbery and, consequently, held that the prosecution had proved its case beyond reasonable doubt.

[3] The trial Court had taken into account or given sufficient consideration to every material circumstance that was in favour of the appellant.

[4] For the reasons adumbrated above, the Court found no real substance in this appeal to merit an interference.

[Appeal dismissed. Sentence affirmed].

Cases referred to:

Lye Boon Hong & Anor. v. Ishihara Sangyo Kaiun Goshi Kaisha [1932] MLJ 175 ***(refd)***
Thevar v. The Crown [1934] MLJ lxii Vol. III ***(refd)***
The Crown v. Chan A. Gah [1934] MLJ lxii ***(refd)***
Tay Kim Siak v. Rex [1934] MLJ lxii ***(refd)***
The King v. Ong Chwee Hoh & Anor. [1933] MLJ 39 ***(refd)***
Ooi Teik Chin v. PP [1971] 1 MLJ 51 ***(refd)***
Public Prosecutor v. Lee Soon Sian [1993] 2 CLJ 214 ***(refd)***
Sun Kam Heng v. Public Prosecutor [1993] 1 CLJ 109 / [1993] 1 AMR 2 ***(refd)***
Chean Siong Guat v. Public Prosecutor [1969] 2 MLJ 63 ***(refd)***
Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2) [1977] 1 MLJ 15 ***(refd)***
Leo Fernando v. Reg [1959] 25 MLJ 158 ***(refd)***
Khoon Chye Hin v. Public Prosecutor [1961] 27 MLJ 105 ***(refd)***
Tua Kin Ling v. Public Prosecutor [1970] 2 MLJ 61 ***(refd)***
Su Ah Ping v. Public Prosecutor [1980] 1 MLJ 75 ***(refd)***
Public Prosecutor v. Lee Pak [1937] MLJ 265 ***(refd)***
Daniel v. Public Prosecutor [1956] MLJ 186 ***(refd)***
Mohamed Kassim v. R [1956] MLJ 212 ***(refd)***
A. Gabriel & Anor. v. Public Prosecutor [1957] MLJ 83 ***(refd)***
Khoon Chye Hin v. Public Prosecutor [1961] MLJ 105 ***(refd)***
Samsudin v. Public Prosecutor [1962] MLJ 405 ***(refd)***
Abdullah Zawawi v. Public Prosecutor [1985] 2 CLJ 2 / [1985] 2 MLJ 15 ***(refd)***
Munusamy v. Public Prosecutor [1987] CLJ 250 / [1987] 1 MLJ 492 ***(refd)***
Public Prosecutor v. Sanassi [1970] 2 MLJ 198 ***(refd)***
Public Prosecutor v. Er Ah Kiat [1966] 1 MLJ 9 ***(refd)***
Wong Heng Fatt v. Public Prosecutor [1959] 25 MLJ 20 ***(refd)***
Udayar Alagan & Ors. v. Public Prosecutor [1962] 28 MLJ 39 ***(refd)***
Pang Chee Meng v. Public Prosecutor [1992] 1 CLJ 39 / [1992] 2 SCR 1 ***(refd)***
Public Prosecutor v. Tan Gong Wai & Anor. [1985] 1 MLJ 355 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 36
Criminal Procedure Code, ss. 257, 293, 295(5), 307(vi), 425
Firearms (Increased Penalties) Act 1971, ss. 2, 4

For the appellant - S. Menon (Liza Chan with him)
For the public prosecutor - Chew Soo Ho, DPP

JUDGMENT

Haji Abdul Malik Bin Haji Ishak JC:

This is an appeal against the decision of the Judge, Sessions Court, Taiping, Perak ("trial Court") who convicted the appellant on a charge under s. 4 of the Firearms (Increased Penalties) Act 1971, whereby the appellant was sentenced to imprisonment for life and ordered to receive six strokes of the rattan. The charge against the appellant reads as follows:

> That you on 17 May 1987 at about 6.15 p.m. at house No: 2, Regat Larut, Lake View Garden, Taiping, in the District of Larut and Matang, in the State of Perak, committed a scheduled offence, to wit, robbery on (1) Ooi Leong Seng IC 0585246 (i) cash RM350 (2) Tye Kar Pin IC 2550025 (i) one pair of gold earring RM250 (ii) one gold ring RM200 (iii) one gold necklace RM200 (iv) one Christine Dior wristwatch RM50 (3) Ooi Hooi Neng IC A0420415 (i) one pair of gold earring RM200 (ii) three gold ring RM60 (iii) cash RM350 (4) Ooi Hooi Imm IC 7236327 (i) one gold necklace RM200 (ii) one gold bangle RM200(iii) cash RM250 (5) Ong Hoo Kooi IC 7384470 (i) one playboy wristwatch RM100 (ii) one gold necklace RM150 total value RM2560 and at the time of commission of the said scheduled offence as defined under s. 2 of the Firearms (Increased Penalties) Act 37/71, exhibited a firearm, to wit, a revolver .32 Colt 6 Chamber Police Positive Special No: 769201 in a manner likely to put the said victims (1) Ooi Leong Seng IC 0585246 (2) Tye Kar Pin IC 2550025 (3) Ooi Hooi Heng IC A0420415 (4) Ooi Hooi Imm IC 7236327 (5) Ong Hoo Kooi IC 7384470 in fear of death or hurt, and that you have thereby committed an offence punishable under s. 4 of the Firearms (Increased Penalties) Act 37 of 1971.

The facts are briefly as follows:

On 17 May 1987 at about 6.00 p.m. while Ooi Leong Seng (PW5) was watching television in his house at No: 2, Regat Larut, Lake View

Garden, Taiping ("the said house"), he heard someone unlatching the front gate of the said house. He got up to check and saw three male Chinese entering the said house. Boldly, he asked who they were; one of them, namely the appellant, in a show of bravado, pointed a revolver at him. (PW5) was told by the accused to call his family members. As (PW5) was led inside the said house, he saw his wife, Tye Kar Pin (PW9) being escorted from the kitchen by another male Chinese who was armed with a pistol. (PW5) shouted to his two daughters, who were upstairs, to come down. At that time, (PW5)'s daughter by the name of Ooi Hooi Imm (PW11) was talking over the telephone with Ong Hoo Kooi (PW3). Eventually both of his daughters came down. After relieving his wife and his two daughters of their jewelleries and valuables, they were then tied up and locked in the study room. In the course of the trial, (PW5) identified the three male Chinese that came with the appellant as Tan Tin Nyang, Tan Fook Loy and Wan Kam Peng.

A short while later (PW3) came to the said house and called for (PW11). The appellant asked the younger daughter of (PW5) by the name of Ooi Hooi Kim to go out and inform (PW3) that (PW11) was not in. All along, (PW5) pleaded with the appellant not to harm his family. (PW5) took the appellant upstairs in order to show him where the jewelleries were kept. There (PW5) saw two of the appellant's friends, *viz* Tan Tin Nyang and Tan Fook Loy ransack one of the bedrooms. Having shown the jewelleries to the appellant, (PW5) was then brought downstairs where the appellant directed Wan Kam Peng to tie (PW5) up. Meanwhile, (PW3) returned, once again, to the said house and he was invited into the said house. Once inside, PW3 was relieved of his gold chain and wrist watch, tied and gagged and was asked to lie down next to (PW5) and (PW9).

A few minutes later, (PW5) heard the arrival of visitors to the said house. The appellant then asked one of his companions to untie (PW5). This was done. (PW5) was then taken to the dining area by the appellant who was still holding onto his revolver. There (PW5) saw four persons, whom he suspected to be police officers, one of whom was DPC 84728 Ramachandran a/l Renggan (PW7). The appellant asked (PW5) to invite them in. It was in evidence that the four persons that came turned out to be detectives. Now, when the four detectives walked towards the door into the dining area, (PW5) heard (PW7) shout in Malay (at that time it was inaudible for (PW5)) and all the four detectives were seen whipping out their revolvers. (PW7) directed the appellant to get out of the said house. Stunned, the appellant meekly complied. The appellant was then directed to lie on his stomach whereupon (PW7) then conducted a body search and felt something like the butt of a revolver. The appellant stood up and struggled to prevent (PW7) from seizing the revolver. In the ensuing struggle, (PW7's) finger accidentally fired the revolver. According to (PW5) it sounded like a gunshot. (PW7) managed to seize the revolver (exhibit P9) and found 3 live bullets and 1 casing inside its chamber. In the appellant's left trouser pocket, (PW7) recovered jewelleries, two wrist watches and some cash. (PW7), in due course, handed all the exhibits to Inspector Mohd. Zain Ismail (PW14).

Later, the police party managed to arrest the other three companions of the appellant, one of whom was armed with a pistol.

It was in evidence, that the police party went to the said house on receipt of information of a robbery that was in progress then. It appeared that Ong Heng Wah (PW2) called the police after he was told by his brother, Ong Hoo Kooi (PW3), that the said house was besieged by robbers. (PW3) was at the material time talking over the telephone with (PW11) and he was informed of a robbery by (PW11). On receipt of the telephone call by (PW2), WPC 90298 Zainab bt. Sa'aid (PW6) lodged a police report (exhibit P15) and alerted the police personnel to the scene.

The armourer ASP Tham Kam Sui (PW12) test fired the revolver (exhibit P9) and he found it to be serviceable. The armourer's report was tendered as exhibit P26.

ASP Yunus bin Ali Bashah (PW13) conducted an identification parade where all the witnesses, except (PW9), identified the appellant.

(PW14), the investigating officer of the case, drew the sketch plan of the scene (exhibit P28) and he also seized the wires and the cloths that were used to tie and gag the victims. (PW14) also caused 15 photographs to be taken by Constable 97040 Mageshwaran (PW4) of the scene of the crime. The victims were all attended to by Dr. Shamsiah (PW1) of Taiping District hospital and their medical reports were

tendered as exhibits P3, P4, P5, P6 and P7. (PW1) confirmed that the injuries on the victims were caused by the wires.

At the hearing of this appeal, the learned Counsel for the appellant raised a number of grounds. The learned deputy public prosecutor, rightly submitted that the learned Counsel for the appellant, relied on grounds that were not itemised in the petition of appeal. Section 307(vi) of the Criminal Procedure Code (F.M.S Cap 6) enacts that the contents of the petition of appeal shall contain definite particulars of the points of law or fact in regard to which the Court appealed from is alleged to have erred. On the contents of the memorandum of appeal, Sir William Murison CJ in *Lye Boon Hong & Anor. v. Ishihara Sangyo Kaiun Goshi Kaisha* [1932] MLJ 175 had this to say:

> We desire to say that the practice prevailing in Singapore as to the contents of memorandum of appeal in civil and criminal cases will in future be enforced in Johore.
>
> It is as follows: Where the appellant is represented by Counsel, the memorandum must contain definite particulars of the points of law or fact in regard to which the trial Judge is alleged to have erred.
>
> If these requirements are not complied with the appeal may be rejected or adjourned till the next sitting and the appellant will be ordered to pay the costs of the appeal or the costs of the day as the case may be.
>
> Where the appellant is not represented by counsel the formal allegation that the trial Judge has erred in law and fact or either will be accepted, without the particulars above-mentioned.

As a result of the decision in *Lye Boon Hong's* case (*supra*), s. 295(5) of the then Criminal Procedure Code (Ordinance No. 121) was amended by Ordinance No: 36 of 1933 which reads:

> Every petition of appeal shall state the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

Consequently, in *Thevar v. The Crown*, Singapore Magistrate's Appeal No: 13 of 1934, (see [1934] MLJ lxii vol. III), where the deputy public prosecutor objected, upon the hearing of the appeal, that the petition of appeal being more or less in the "stereotyped" form, did not contain a full statement of the particular points in respect of which the trial Magistrate was alleged to have made a wrong order, Prichard J. upheld the objection and dismissed the appeal.

Again, it was reported in [1934] MLJ lxii that the deputy public prosecutor made a similar objection in *The Crown v. Chan A. Gah*, Singapore Magistrate's Appeal No: 15 of 1934, and although the Counsel for the appellant pointed out that the section quoted above did not apply to appeals preferred under s. 293 of the Criminal Procedure Code (Ordinance No. 121), Prichard J. agreed with the deputy public prosecutor that the petition did not conform with the requirements of the law. Then again, in *Tay Kim Siak v. Rex*, Singapore Magistrate's Appeal No. 31 of 1934, (see [1934] MLJ lxii), the same Judge refused to entertain the appeal because the petition did not set out with sufficient particularity the grounds upon which it was alleged the judgment or order appealed from was wrong.

The above cited cases reflected the mandatory nature of s. 295(5) of the Criminal Procedure Code (Ordinance No.121).

Our present s. 307(vi) of the Criminal Procedure Code (F.M.S. Cap 6) is worded in almost identical terms with s. 295(5) of the Criminal Procedure Code (Ordinance No: 121) except with the addition of the word "shortly" after the word "state". It reads thus:

> 307(vi). Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred.

It was held in *The King v. Ong Chwee Hoh & Anor.* [1933] MLJ 39 that if it was alleged in a petition of appeal that the conviction was against the weight of evidence, then the petition should specify in what way the conviction was against the weight of evidence. On the other end of the scale, it was held in *Ooi Teik Chin v PP* [1971] 1 MLJ 51 that if the verdict was alleged to be against the weight of evidence, then the appellant has to show that the conviction was unreasonable or could not be supported having regard to the evidence.

Here, the appellant was represented by Counsel before the trial Court and before me, he too was represented by Counsel. From the record of

proceedings, it appeared that the appellant, initially, appealed against the sentence imposed on him through the Prisons. Later, an application was filed by Messrs. Liza Chan & Co. before the High Court, Ipoh, Perak on behalf of the appellant to amend the notice of appeal and to file and rely on the petition of appeal as per enclosure "B". Before me, the same petition of appeal as per enclosure "B" remains and forms the basis of the appeal.

From the authorities cited above, the legal situation appears to be that the appellant must abide by the petition of appeal and the learned Counsel for the appellant, in all fairness to the learned deputy public prosecutor, should submit solely on the points of law or fact as set out in the petition of appeal and should not dabble on points of law or fact not set out in the petition of appeal. In my judgment, s. 307(vi) of the Criminal Procedure Code (F.M.S. Cap 6) is couched mandatorily and any failure to observe it would be fatal. In the circumstances, this Court is entitled to disregard the grounds that were not itemised in the petition of appeal.

However, in the event I have erred, I next consider whether I should exercise my revisionary powers in order to right the wrong, so to speak. Now, it is trite law that the duty of a Judge sitting in his revisionary capacity is not confined to matters raised by the parties only. The Judge may, in appropriate cases, pry into the deeper aspects of the case so as to ensure that substantial justice subsists between the accused and the accuser. However, I must signal a warning that in future, failure to abide to the mandatory requirements of s. 307(vi) of the Criminal Procedure Code (F.M.S. Cap 6) would mean dismissal of the appeal forthwith.

Chapter XXXI of the Criminal Procedure Code (F.M.S. Cap 6) which deals with revision should be read with s. 36 of the Courts of Judicature Act 1964 which reads as follows:

> 36. Subject to any written law for the time being in force no party shall have any right to be heard before the High Court when exercising its power of revision and supervision:
>
> Provided that no final order shall be made to the prejudice of any person unless the person has had an opportunity of being so heard.

I am of the considered view, that any order made by a Judge on revision cannnot be the subject of an appeal and the order shall be deemed to be a final order and is, therefore, subject to the proviso to s. 36 of the Courts of Judicature Act 1964.

At the outset, in exercising my revisionary powers, I propose to deal with four major points of law that were not set out in the petition of appeal but was raised by the learned Counsel for the appellant before me. The four major points relate to: (1) the break in the chain of evidence in regard to the revolver (exhibit P9) (2) the application of s. 425 of the Criminal Procedure Code (F.M.S. Cap 6) (3) the search list (exhibit P17), and (4) the failure to tender the police report No. 5575/87.

The break in the chain of evidence in regard to the revolver (exhibit P9)

The learned Counsel for the appellant submitted painstakingly in regard to the evidence of the prosecution witnesses in an attempt to show the break in the chain of evidence in regard to the revolver (exhibit P9).

From the record of proceedings, the following evidence emerged.

(PW7) seized the revolver (exhibit P9) from the appellant after a brief scuffle; a shot was accidentally fired from the revolver (exhibit P9) by (PW7) when (PW7)'s finger accidentally touched the trigger. This gunshot was heard by (PW5), an ex-police Inspector. (PW7) identified the revolver as exhibit (P9) and he then proceeded to describe the said revolver as: "Apabila saya ambil revolver itu saya dapati serial nombornya 769201 jenis .32 Colt 6 chamber police positive special." (PW7) then proceeded to examine the revolver (exhibit P9) and he found 3 live bullets and 1 casing inside its chamber. Before the trial Court, (PW7) identified 2 live bullets (exhibit P16A) and 2 casings (exhibit P16B) and this brought an adverse comment by the learned Counsel for the appellant. It is now apparent that such adverse comment was totally misconceived as the armourer (PW12) had used one of the live bullets in test firing the revolver (exhibit P9). The remainder of the 2 live bullets were said to be serviceable (see armourer's report (exhibit P26)). The armourer (PW12) further concluded that the revolver (exhibit P9) was serviceable. (PW7) then proceeded to check bodily the appellant and he found jewelleries (exhibits P11, P18, P19, P20A & B and P20C),

two wrist watches (exhibit P10 and P21) and some cash in the left trouser pocket of the appellant. PW7 prepared the search list (exhibit P17). After explaining the contents of the search list, (PW7) handed a copy of it to the appellant. Before the trial Court, the search list was not objected to by the learned Counsel representing the appellant then. In fact, before me, learned Counsel for the appellant, relied entirely on the search list (exhibit P17) to ground his submission. As to the value of the search list (exhibit P17) see *Public Prosecutor v. Lee Soon Sian* [1993] 2 CLJ 214 and the cases cited therein.

It was in evidence that (PW7) prepared the search list (exhibit 17) at Taiping police station and he then handed the exhibits to (PW14), the investigating officer of the case. This is what (PW7) said before the trial Court: "Selepas rampas barang-barang ini saya bawa balik ke Balai Polis Taiping dan keluarkan search list. Barang-barang ini diserahkan kepada Inspektor Mohd. Zain (referring to PW14)." Learned Counsel for the appellant argued that (PW7) did not hand the revolver (exhibit P9) to (PW14) as he did not specifically say so. With respect, the learned Counsel should read the whole evidence of (PW7) in perspective to appreciate the movements of the revolver (exhibit P9) instead of relying on sentences and paragraphs that sounded favourable to the appellant. (PW7)'s role that day was merely to arrest the appellant, seize the revolver (exhibit P9) from the appellant and seize the items mentioned earlier in the appellant's left trouser pocket and also a wallet (exhibit P24) from the appellant's right trouser pocket. The appellant's NRIC and driving licence were found inside exhibit (P24). The arrest of the other three accused in the said house were left entirely to Inspector Abdul Rahim bin Mohd. Isa (PW8) and his police personnel. (PW8) later handed the exhiblts to (PW14).

One out of the three accused (they pleaded guilty to lesser charges and had been sentenced accordingly by the Sessions Court) was arrested with a pistol (exhibit P14) loaded with 3 bullets, one in its chamber and the other two in its magazine (exhibit P14A). The learned Counsel for the appellant argued that there were two firearms involved in the case and the need to establish the chain of evidence became more acute and onerous. However, there is one distinct difference between the revolver (exhibit P9) and the pistol (exhibit P14). The revolver has a serial number 769201 whereas the pistol is unnumbered. An easy way to differentiate the two firearms (Compare with *Sun Kam Heng v. Public Prosecutor* [1993] 1 AMR 2 p. 49, where the revolver in that case was without a serial number and the police did not put any identifying mark on it, which consequently, due to a serious break in the chain of evidence, the appellant's conviction was set aside by the Supreme Court). The learned Counsel for the appellant further argued that at the scene, (PW7) showed to (PW8) the revolver that was seized from the appellant. But according to (PW8), (PW7) did not tell him about the number of the revolver. This, according to the learned Counsel for the appellant, was fatal. This is what (PW8) said under cross-examination: "DPC Chandran ada beritahu satu revolver dijumpai daripada lelaki cina itu. Dia tunjukkan revolver itu kepada saya. Nombor revolver tidak diberitahu." Now, one must bear in mind that when (PW8) arrived at the said house, only the appellant was under police custody. The remainder of the gang were still in the said house "hounding" the occupants of the said house. The situation then must have been tense. In such a situation, the failure of (PW7) to inform (PW8) in regard to the serial number of the revolver (exhibit P9) should not be made the subject of an adverse comment by the learned Counsel for the appellant. All along (PW7) held he had prepared the search list, he then handed the revolver to (PW14). Such was the quality of (PW7)'s evidence in regard to the revolver. Thus, the adverse comment by the learned Counsel for the appellant is misconceived. Next, the learned Counsel for the appellant, argued that under cross-examination (PW8) denied that (PW7) showed him the exhibits which he (PW7) had seized and consequently, such failure was also fatal. This is what (PW8) said under cross-examination: "Dia tidak tunjuk barang-barang yang dijumpai daripada lelaki cina yang ditangkapnya". Learned Counsel for the appellant sought to capitalise on this discrepancy in the evidence of (PW7) and urged the Court to rule favourably for the appellant. In my judgment, this discrepancy is minor in nature. It has been said that "in weighing the evidence of witnesses, human fallibility in observation, retention and recollection are often recognised by the Court" (*Chean Siong Guat v. Public Prosecutor* [1969] 2 MLJ 63). Raja Azlan Shah FJ (as His Majesty then was) said in *Public Prosecutor v.*

Datuk Haji Harun bin Haji Idris (No. 2) [1977] 1 MLJ 15 that:

> I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A Court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

In *Leo Fernando v. Reg* [1959] 25 MLJ 158, Rose CJ had this to say in regard to discrepancy:

> ... the fact that there were discrepancies in the accounts given by witnesses is a matter which might well be in favour of their truthfulness rather than the reverse.

Again, in *Khoon Chye Hin v. Public Prosecutor* [1961] 27 MLJ 105, Thomson CJ had this to say in regard to discrepancy:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong.

Finally, on the same subject matter, Syed Othman J. in *Tua Kin Ling v. Public Prosecutor* [1970] 2 MLJ 61, had this to say:

> But it is the duty of the Court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted. In this case however the learned Magistrate did not do so. He accepted the evidence of PW1 wholesale without rejecting the parts which had been shown to be inconsistent with the truth.

In my judgment, relying on the authorities cited above, I have scrutinised with great care, and cautiously the evidence of (PW8), and came to the conclusion that his evidence could be accepted. What is material on the evidence of (PW8), in so far as the revolver (exhibit P9) was concerned, is this: (PW8) did not hold onto the revolver but he knew that the revolver was seized by (PW7).

On 17 May 1987 at 7.15 p.m. (PW14) arrived at the scene with the police photographer (PW4). There (PW14) was informed of the arrest of the appellant and three other male Chinese. (PW14) directed (PW4) to take 15 photographs of the scene (exhibit P12A-O) and he also drew sketch plans (exhibit P27 and P28) and the keys to it (exhibit P27K and P28K). (PW14) also recovered cloths (exhibit P2). (PW14) then deposed that he received from (PW7):

(1) one revolver .22 No: 769201 (exhibit P9) together with 3 live bullets and 1 casing inside its chamber. Before the trial Court, (PW14) identified (exhibit P16A) as 2 live bullets and (exhibits P16B) as 2 casings. (PW14) also identified the envelope as exhibit (P9A). That envelope was marked "F".

(2) the jewelleries (exhibits P11, P18, P19, P20A and B and P20C) and two wrist watches (exhibits P10 and P21).

(PW14) further deposed that he received from (PW8) the pistol (exhibit P14) loaded with 3 bullets as stated in the early part of this judgment (exhibit P14A) and some cash. For the purpose of this appeal, I need not harp too much on the pistol and the other exhibits handed by (PW8) to (PW14).

On 27 May 1987 at 12.40 p.m. ASP Yunus bin Ali Bashah (PW13) sent the revolver with 3 live bullets of .32 series and the pistol with 3 live bullets of .22 series to the armourer (PW12). Having tested its serviceability, (PW12) returned the same exhibits to (PW13) on 1 June 1987 at 4.30 p.m. On 2 June 1987 at 11.55 a.m. (PW14) received the above exhibits from (PW13). At that time, the revolver and the .32 bullets were placed inside envelope (P9A) marked 'F', whereas the pistol and the .22 bullets were placed inside envelope (P14D). In the course of the appeal, both parties drew my attention to the typing errors at p. 59 of the record of proceedings where (P9A) was inadvertently typed as (P19A) and at p. 73 of the record of proceedings where exhibit (P14D) was not typed out therein. So much for the evidence in regard to the revolver in question. All in all, it is my judgment, that there was no break in the chain of evidence pertaining to the revolver. It must be borne in mind that the burden of proof on the

prosecution is to prove its case against the appellant beyond all reasonable doubt; it is not the duty of the prosecution to prove the guilt of the accused beyond any shadow of a doubt or to any mathematical accuracy. With respect to the learned Counsel for the appellant, in launching a concerted attack against the prosecution, he proceeded on the wrong assumption that the prosecution must prove its case on a mathematical accuracy. Thus, he failed to appreciate that when (PW7), who seized the revolver from the appellant (bearing in mind that the revolver bore serial number 769201) at the scene and then produced and identified it as that very object, that would be sufficient and certainly fall within the principle as laid out in *Su Ah Ping v. Public Prosecutor* (1980) 1 MLJ 75 FC. Without the slightest doubt, the complaint by the learned Counsel for the appellant was a mere storm in the teacup. Consequently, this ground fails.

The application of s. 425 of the Criminal Procedure Code (F.M.S. Cap 6)

It was submitted by learned Counsel for the appellant that the prosecution or alternatively the trial Court should have resorted to s. 425 of the Criminal Procedure Code (F.M.S. Cap 6) in calling Wong Kam Peng, Tan Fook Loy and Tan Ting Nyang. These witnesses were offered by the prosecution to the defence at the close of the prosecution's case.

It is now trite law that the decision whether to call or not to call a witness including a witness from whom a statement has been recorded is always the prerogative of the prosecution. The Court cannot dictate to the prosecution as to the number of witnesses they want to call. Neither is the Court empowered to tell the prosecution which particular witness is to be called. The Court is duty bound to listen to the evidence adduced by the prosecution. The trial Court did just that. See *Public Prosecutor v. Lee Pak* [1937] MLJ 265, *Daniel v. Public Prosecutor* [1956] MLJ 186, *Mohamed Kassim v. R* [1956] MLJ 212, *A. Gabriel and Anor v. Public Prosecutor* [1957] MLJ 83, *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105 CA, *Samsudin v. Public Prosecutor* [1962] MLJ 405 and *Abdullah Zawawi v. Public Prosecutor* [1985] 2 MLJ 15 SC. It is not the duty of the trial Court to call these witnesses on behalf of the prosecution. The trial Court's duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 SC and *Abdullah Zawawi v. Public Prosecutor* (*supra*)). But the prosecution's right not to call Wong Kam Peng, Tan Fook Loy and Tan Ting Nyang from whom statements must have been taken, must always be guided by its duty to discharge the onus of proof (see *Abdullah Zawawi v. Public Prosecutor* (*supra*)). Here, that onus has been discharged by the prosecution through (PW5) and his daughter (PW11), both of whom, categorically described the active role played by the appellant at the time of the robbery. On perusal of the record of proceedings, the trial Court had acted within the framework of the law when it considered the evidence in its correct perspective. This ground fails.

The search list (exhibit P17)

It was submitted that the search list (exhibit P17) incorporated the discovery of the revolver and not the pistol. Consequently, it was argued that the material discrepancy of this nature would be fatal. This argument is certainly misconceived and does not take into account that: firstly, the appellant faces a charge in relation to the revolver and not the pistol; secondly, from the recital of the facts, (PW7) seized the revolver from the appellant together with the other relevant exhibits which were all set out in the search list (exhibit P17). Surely, (PW7) cannot incorporate the pistol in the search list (exhibit P17) as he did not seize that pistol. This ground fails.

The failure to tender the police report number 5575/87.

Much fuss was created by the learned Counsel for the appellant in regard to the failure of the prosecution to tender this report. It must be recognised that this police report was not the first information report and therefore it should not be admitted in evidence. The prosecution took the right course in not tendering this report. Such a report made after the commencement of the investigation has very little or negligible value as the chance of embellishment and improvement on such a report cannot be ruled out. This ground also fails.

There are numerous grounds of appeal set out in the petition of appeal on behalf of the appellant.

But, unfortunately, most of the grounds of appeal were not relied upon and they were left in limbo. The learned Counsel for the appellant relied upon ground number 5 of the petition of appeal, in regard to s. 257 of the Criminal Procedure Code (F.M.S. Cap 6). Now, on this point it was submitted that the trial Court had failed to explain the case for the prosecution to the undefended appellant. Encik Rama was the Counsel for the appellant right through till 18 July 1989 when the appellant requested for another Counsel from Messrs. Cheang Lee & Ong. Encik Rama told the trial Court that he had left the firm that handled the case. And on that day (18 July 1989) Encik Rama was said to be ill. The trial Court then adjourned the case to 6 and 7 September 1989. On 6 September 1989, when the case came up for continued hearing, Counsel for the appellant was absent and since the trial Court had a matter at Parit Buntar, the case was fixed for continued hearing on 7 September 1989.

On 7 September 1989, Encik Rama appeared for the appellant and he informed the trial Court that the appellant wanted to engage another Counsel from Messrs. Cheang Lee & Ong and that he had not been appointed as Counsel for the appellant. The trial Court then proceeded with the continued hearing in the absence of Counsel. The prosecution's witness by the name of Ooi Hooi Imm (PW11) took the stand and this witness was supposed to be cross-examined on that day by the appellant. The appellant reserved his cross-examination of (PW11) and this was allowed by the trial Court. The next witness was ASP Tham Kam Sui (PW12) - the armourer, and after his examination-in-chief, the appellant reserved his cross-examination and this was, again, allowed by the trial Court. The next witness was ASP Yunus bin Ali Bashah (PW13) and the appellant did not cross-examine him. The last witness for the prosecution was Inspector Mohd. Zain Ismail (PW14) and the appellant then reserved his cross-examination of this witness which was allowed by the trial Court. The prosecution then closed its case and offered several witnesses to the defence. The appellant reserved his right to decide which of the offered witnesses he would accept. The trial Court then adjourned the hearing to 21 November 1989.

On 21 November 1989, Encik Rama appeared for the appellant and he then applied for cross-examination of (PW13). The prosecution did not object and the trial Court allowed Encik Rama's application. After (PW13) had been cross-examined by Encik Rama, the record of proceedings showed an unusual stand adopted by him:

> Encik Rama: tidak perlu panggil lain-lain saksi.
> Sgd: Sessions Court Judge.
>
> Pegawai Pendakwa: Menutup kes.
> Sgd: Sessions Court Judge.
>
> Encik Rama: Saya ingin:
>
> (1) Wang Kam Peng
> (2) Tan Fook Loy
> (3) Tan Ting Nyang.
>
> Sgd: Sessions Court Judge.

This was followed by the submissions of both parties and, consequently, the appellant was called to enter his defence by by the trial Court. After three alternatives had been explained to him, the appellant chose to give his evidence in the dock (unsworn evidence). Now, at this stage, Encik Rama was still acting for the appellant. Thereafter, the record of proceedings showed the stand taken by Encik Rama:

> Saya tidak ingin panggil saksi-saksi lain untuk kes ini. Itu sahaja kes pembelaan.
> Sgd. Sessions Court Judge.

Thereafter, the trial Court heard submissions by both parties.

Before me, learned Counsel for the appellant launched a concerted attack against the trial Court's failure to comply with s. 257 of the Criminal Procedure Code (F.M.S. Cap 6) and urged me to set aside the conviction or alternatively to order a retrial. From the recital of the facts, though the trial Court had proceeded to hear the case in the absence of Counsel, yet he gave ample opportunity to Encik Rama to recall the prosecution witnesses on 21 November 1989. The appellant was allowed the option to reserve cross-examinations of (PW11), (PW12) and (PW14). Though the appellant did not wish to cross-examine (PW13) on 7 September 1989, yet when the case came up for continued hearing on 21 November 1989, the trial Court allowed Encik Rama to recall and cross-examine (PW13). In my judgment, the trial Court rightly proceeded with the trial in the absence of Counsel on 7 September 1989 as the appellant was first produced before the lower Court on 15 July 1987. The trial Court was entitled to be strict on matters of this nature. The appellant was not prejudiced when the trial continued

on 7 September 1989 as the trial Court gave ample leeway to his Counsel, Encik Rama, on 21 November 1989, when the case came up for continued hearing. This ground. therefore, fails.

Ground No. 6 of the petition of appeal was also relied upon by the learned Counsel. This ground alleges that the trial Court allowed the pistol to be marked as an exhibit and, consequently, this has resulted in a miscarriage of justice. But, from the recital of the facts, it would be apparent that though the pistol was tendered as an exhibit, yet the trial Court in the course of his judgment, concentrated on the revolver, the subject matter of the charge, in coming to the conclusion that it was the appellant that held onto the said revolver at the time of the robbery. A great deal of emphasis was laid on the revolver by the trial Court, in the course of his judgment, and consequently, the allegation in ground 6 of the petition of appeal is totally unfounded.

In regard to ground No. 8 of the petition of appeal, the learned Counsel for the appellant argued that the trial Court knew that the other three accused persons had pleaded guilty to other charges levied against them and such knowledge had influenced the trial Court and, consequently, prejudiced the appellant. However, the learned Counsel, for the appellant had failed to list out in what manner such knowledge had influenced the trial Court and had prejudiced the appellant. From the record of proceedings, the trial Court was more concerned about the charge against the appellant rather than about the charges in regard to the other three accused persons. This ground, therefore, fails.

The learned Deputy Public Prosecutor rightly pointed out that thc ingredients of s. 4 of the Firearms (Increased Penalties) Act 1971 (Act 37) have been fulfilled. The robbery carried out by the appellant was witnessed by (PW5), an ex-police Inspector. It was in evidence that the appellant pointed the revolver at (PW5) and told him (PW5) that it was a robbery in Cantonese dialect. (PW3) also testified that as he entered the premises it was the accused that pointed the revolver at him. (PW11) also testified that as she came downstairs, she saw the accused holding onto the revolver. The accused at that time, according to (PW11), was pointing the revolver towards them but not towards a particular individual. There was ample evidence of robbery by the appellant as can be seen with the recovery of the jewelleries, two wrist watches and some cash on the appellant. It was also in evidence that (PW5) appealed to the appellant not to harm him and his family members. Even (PW11) was categorical in stating that she feared for her life. This is what she said:

> Yang Tertuduh ada beritahu kami supaya berdiam dan jangan buat apa jika tidak dia akan pukul kami. Dia bercakap dalam bahasa cina. Kami takut dibunuh.

(PW3), (PW5) and (PW11) not only identified the revolver that was used by the appellant but they also identified positively the appellant at the identification parade. (PW9), the wife of (PW5), testified that one of the robbers mentioned that it was robbery and she was escorted to the house at gun point. She identified the firearm as the pistol. She testified that she was relieved of her jewelleries. However, this witness was not able to identify the revolver nor the appellant. Next, (PW10) though she could not identify the appellant and the revolver yet, she stated that on that day there was a robbery and a pistol was pointed at her. Thus, from the recital of the facts: robbery, exhibition of the revolver at the time of the commission of the robbery and the likelihood of putting (PW3), (PW5), (PW11), (PW9) and (PW10) in fear of death or hurt are proved beyond reasonable doubt by the prosecution.

The learned Counsel for the appellant launched a concerted attack against the trial Court for failing to consider the defence of duress set up by the appellant in its proper perspective. The trial Court had given due weight and consideration to the appellant's defence though the appellant merely gave unsworn evidence from the dock. The trial Court considered not only *Public Prosecutor v. Sanassi* [1970] 2 MLJ 198 in construing the unsworn evidence of the appellant but he went one step ahead and rightly took into account *Public Prosecutor v. Er Ah Kiat* [1966] 1 MLJ 9, though he did not say so in so many words. Raja Azlan Shah J. (as His Majesty then was) said in *Er Ah Kiat's* case (supra):

> The accused elected to make a statement from the dock. I have to consider his defence which may have one of three results: it may convince me of his innocence, or it may cause me to doubt the truth of the prosecution case, in which case the accused is entitled to an acquittal, or it may, and sometimes does, strengthen the case for the prosecution.

For further treatment on this subject, see *Wong Heng Fatt v. Public Prosecutor* [1959] 25 MLJ 20 and *Udayar Alagan & Ors. v. Public Prosecutor* [1962] 28 MLJ 39.

In his defence, the appellant admitted committing the armed robbery and alleged that he was under threat from one Ah Loy. The appellant alleged that it was Ah Loy that gave him the firearm and that it was Ah Peng that escorted (PW5)'s wife (i.e. PW9) into the house. From the evidence adduced by the prosecution, Ah Peng was also armed with a pistol at that time. Ah Loy was not armed with a firearm but the appellant has the audacity of saying that he was threatened by Ah Loy. If Ah Loy had threatened the appellant, that threat would have disappeared once the appellant held the revolver. Moreover, from the record of proceedings, the nature of the threat or how Ah Loy proposed to execute the threat was not adduced by the appellant. From the evidence adduced by the prosecution, there was overwhelming evidence of the active role of the appellant throughout the robbery. The trial Court rightly ruled that, on the balance of probabilities, the appellant had failed to prove that there was threat or an apprehension of threat on his person by Ah Loy. The trial Court further rightly came to the conclusion that the appellant was a willing and active participant in the armed robbery and, consequently, held that the prosecution had proved its case beyond reasonable doubt.

However, the learned defence Counsel for the appellant argued that the trial Court erred when it stated that:

> All the 3 friends of the accused were offered to him at the end of the prosecution's case but he chose not to call any of them. Though there is no duty on the defence to call witnesses it surely helps as the accused wanted to invoke an exception which would be a complete defence to the charge. It is his duty to prove that he comes within the exception.

I have no doubt that the trial Court in employing those words did not run foul of the time honoured principle of criminal law that the defence ought not to be criticised for taking a certain course of action in the course of his defence. In this regard, the case of *Pang Chee Meng v. PP* [1992] 2 SCR 1 decided by the Lord President Tun Abdul Hamid comes to the forefront. This is what his Lordship said:

> Whether the accused testifies or adopts other means is a matter of choice for him and counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course.

On the same point, Edgar Joseph Jr. J. (as he then was, now Supreme Court Judge) in *Public Prosecutor v. Tan Gong Wai & Anor.* [1985] 1 MLJ 355 especially at p. 361, had this to say:

> I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew v. Public Prosecutor* [1949] MLJ 150). However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence (*Regina v. Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v. Lim Kuan Hock* [1967] 1 MLJ 114; *Tay Choo Wah v. Public Prosecutor* [1976] 2 MLJ 95). In the present appeal, the trial Court was merely assessing the weight of the appellant's evidence when he made those remarks and it cannot certainly be said to be wrong.

Looking at the grounds of judgment, I have come to the conclusion that the trial Court had taken into account or given sufficient consideration to every material circumstance that was in favour of the appellant. For the reasons adumbrated above, I find no real substance in this appeal to merit an interference. Consequently, the appeal against conviction is dismissed and the sentence is affirmed.